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FEDERAL CREDIT UNION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO DIVISION

In re

RUBEN ALCARAZ JR.
aka RUBEN ALCARAZ
SSN/ID: xxx-xx-4883

Debtor.

FARMERS INSURANCE GROUP
CREDIT UNION

Plaintiff,

vs.

RUBEN ALCARAZ JR.
aka RUBEN ALCARAZ

Defendant.

CASE NO. 15-08187-LA7

CHAPTER 7

ADV. NO. 16-90111 LA

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR ENTRY
OF DEFAULT JUDGMENT
UNDER 523

Hearing Scheduled For:

Date: June 8, 2017

Time: 11:00 a.m.

Courtroom: Department 3 (Rm 129)

COMES NOW Plaintiff, Farmers Insurance Group Federal Credit Union (hereafter the "Credit Union") and submits its Points and Authorities in support of the Credit Union's motion to enter a default judgment against the Defendant under 523(a)(2)(A) and (B).

I. BACKGROUND

The Credit Union filed a motion for leave to take the Defendant's 2004 Examination. The Court Order required the Defendant to appear and produce a number of documents. The Exhibit Index filed concurrently herewith notes not only the exhibit

1 number of Exhibits attached to it, but also references their exhibit numbers as they pertain
2 to the Defendant's 2004 Examination.

3 The Defendant, Ruben Alcaraz Jr. aka Ruben Alcaraz (hereafter the "Defendant")
4 was a Farmers Insurance Group of Companies agent. As a result of his being an agent
5 for Farmers Insurance Group of Companies (hereafter the "Insurance Companies"), he
6 fell within the field of membership for the Credit Union.

7 The Credit Union is a separate entity from the Insurance Companies. The Credit
8 Union derives its name from the fact that its primary field of membership are the agents,
9 district managers, employees, and the family members of the Insurance Companies.
10 The Credit Union also has a few other small employee groups within its field of
11 membership.

12 The Credit Union is a not-for-profit cooperative corporation duly organized and
13 existing under the laws of the United States of America. It is a federally chartered Credit
14 Union.

15 The Defendant had four (4) outstanding loans with the Credit Union in 2014. One
16 (1) of the loans was co-signed by his now ex-wife. The Credit Union obtained a Judgment
17 in the San Diego County Superior Court on November 9, 2015, in the sum of \$74,520.61.
18 The Credit Union is asking the Court to find the loans upon which the Judgment was
19 based to be non-dischargeable. The Judgment is Exhibit "1", annexed to the Exhibit
20 Index filed concurrently herewith, and incorporated herein by this reference. (All of the
21 exhibits referenced in this Memorandum of Points and Authorities are annexed to the
22 Exhibit Index filed concurrently herewith for the Court's convenience and are incorporated
23 herein by this reference.)

24 The Judgment was based upon the four (4) following subaccounts.

- 25 **a. Sub-account xxx30-L40.2 (granted on September 20, 2012, Vehicle**
26 **Secured Loan).**
- 27 **b. Sub-account xxx30-L75 (granted on June 6, 2013, VISA).**

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1 c. **Sub-account xxx30-L82** (granted on **January 13, 2014**, Home Equity Line
2 of Credit referred to as a "HELOC").

3 d. **Sub-account XXX30-L1** (granted on **January 6, 2014**, signature loan).

4 The Defendant obtained a number of loans from the Credit Union as early as
5 March 23, 2012. Many of the loans were either paid off directly or were refinanced by
6 later loans. The Defendant, on his numerous loans, misrepresented material matters on
7 written applications to the Credit Union, as well as other documentation he provided to the
8 Credit Union, including Personal Financial Statements.

9 The first misrepresentation began on March 23, 2012 loan. The Defendant misled
10 the Credit Union on the 2012 Personal Financial Statement, he provided to the Credit
11 Union and caused the Credit Union to believe that as of March 23, 2012 (prior to the 2011
12 taxes being due), he only had outstanding the sum of \$20,419.00 in unpaid taxes for
13 2011. (Said Personal Financial Statement is Exhibit "5".) Specifically, the Defendant
14 typed in:

15 "Federal Taxes for 2011 - \$18,470.00 / State Taxes for 2011 - \$1,949.00."

16 The typed information on Exhibit "5" was provided to the Credit Union by the
17 Defendant. As stated in the Declaration of Ramil Aguilar, the Credit Union made available
18 to its members its loan application forms on the internet and gave its members the forms
19 to complete by hand or typewriter.

20 We now know from the numerous documents the Defendant produced at his 2004
21 Examination that as of January 2012, the Defendant knew that he was past due for his
22 federal income taxes for tax years 2009 and 2010, in the sum of \$22,648.62. This is in
23 addition to the sum of \$18,764.00, the Defendant indicated he owed on the Defendant's
24 2011 federal income tax return that he produced at his 2004 Examination. Defendant
25 also owed an additional \$2,129.00 for his 2011 California State Income Taxes. We now
26 know that as of March 2012, the Defendant actually owed in back and current taxes the
27 sum of \$43,541.62. The Declaration of Ramil Aguilar makes it very clear that had the
28 Credit Union known, as of March 2012, that the Defendant owed so much in past due

1 income taxes, he would not have qualified for any of the loans that he was granted by the
2 Credit Union, including the four (4) loans which remained outstanding at the time the
3 Credit Union took its judgment against Defendant in State Court. It is those outstanding
4 loans that were reduced to a state court judgment that the Credit Union now seeks to
5 have declared non-dischargeable.

6 It is worth nothing, as of March 9, 2012, the Defendant's personal income taxes for
7 2011 were not yet past due. The Defendant had until April 16, 2012 to pay them. The
8 Defendant also knew that his tax situation was becoming worse and worse because he
9 was only paying his past due taxes each year and was not paying any of his estimated
10 taxes. As a result, the amount of past due taxes the Defendant owed each year was
11 increasing.

12 The Defendant also misrepresented his income on the written credit applications
13 and personal financial statements he gave the Credit Union between 2012 and 2014. The
14 Defendant's misrepresentations as to income started with the March 2012 Personal
15 Financial Statement, which he gave to the Credit Union. On said Personal Financial
16 Statement (Exhibit "5"), the Defendant stated his income was the sum of \$11,500.00 per
17 month, from salary/commissions and the sum of \$3,000.00 per month, from other income.
18 In actuality the Defendant's total income according to his 2012 tax return (Exhibit "7") for
19 the entire year was only the sum of \$90,742.00. Said sum divided by twelve (12) is only
20 \$7,561.83 per month.

21 When comparing the Defendant's loan applications to his tax returns, Profit and
22 Loss Statements, and the other documents the Defendant produced at his 2004
23 Examination, we now know that the Defendant was making substantially less than he
24 represented to the Credit Union, and that he also knew it. Worth noting is that the
25 Defendant testified he had easy access to Profit and Loss Statements, and therefore his
26 actual income. Specially, he testified all that he had to do was walk next door to his
27 accountant's office to ask for a Profit and Loss Statement. He admitted doing so on many
28 occasions.

1 It is also clear from the Defendant's testimony during his 2004 Examination that he
 2 understood the difference between his business' gross receipts, i.e., the commissions
 3 paid to his business and his personal net profits, which was his income after deductions
 4 for all expenses incurred by his business.

5 The third point of Defendant's material misrepresentations was the Defendant's
 6 false representations to the Credit Union that he was still a Farmers Insurance Companies
 7 Agent, with continuing income from the sale of Farmers Insurance Policies, on the last two
 8 (2) loans he obtained from the Credit Union. The Defendant applied for said loans after
 9 he has already sold his agency and was no longer selling insurance for Farmers
 10 Insurance Companies. The Defendant knew that his income was changing and that he
 11 had been paid the bulk of the sales price of his business as of December 2013, when he
 12 obtained his final two (2) loans in January of 2014, from the Credit Union.

13 For these reasons, had the Credit Union known the truth of the material facts, the
 14 Credit Union would not have granted Defendant any loans. The risk was simply too great.

15 **II. PROCEDURAL HISTORY OF THE BANKRUPTCY**

16 Defendant filed his Bankruptcy on December 30, 2015. The parties entered into
 17 a Stipulation to Extend Time to File Complaint. The Credit Union filed an Adversary
 18 Complaint under both 11 U.S.C. Sections 523 and 727, on June 27, 2016. The last day
 19 to file a Complaint by Stipulation and a Court Order, at that time was June 30, 2016.

20 The Credit Union now seeks a Judgment under 11 U.S.C. Section 523(a)(2)(A)
 21 and/or (B). If the Court enters a Judgment pursuant to Section 523, it is the intention of
 22 the Credit Union to file a Motion to Abandon the 727 Cause of Action.

23 **III. THE DEFENDANT IS NOT ENTITLED TO A DISCHARGE**

24 **UNDER 11 U.S.C. SECTION 523(A)(2)(A) OR (B)**

25 11 U.S.C. Section 523(a)(2)(A) of the Bankruptcy Code excludes from discharge
 26 debts that are the result of "false pretenses, false representation, or actual fraud," other
 27 than a statement respecting the debtor's financial condition. To prevail under
 28 §523(a)(2)(A), a plaintiff must prove that:

1 “(1) misrepresentation, fraudulent omission or deceptive conduct by the
 2 debtor;
 3 (2) knowledge of the falsity or deceptiveness of his statement or conduct;
 4 (3) an intent to deceive;
 5 (4) justifiable reliance by the creditor on the debtor's statement or conduct,
 6 and
 7 (5) damage to the creditor proximately caused by its reliance on the
 8 debtor's statement or conduct. *Turtle Rock Meadows Homeowners*
 9 *Association v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir.
 10 2000)(citations omitted); accord, *Ghomeshi v. Sabban (In re Sabban)*, 600
 11 F.3d 1219, 1222 (9th Cir. 2010). A creditor bears the burden of proving the
 12 applicability of 11 U.S.C. §523(a)(12)(A) by a preponderance of the
 13 evidence. *Id.*”

14 Section 523(a)(2)(B) of the Bankruptcy Code excepts debts from discharge to the
 15 extent they were incurred through "use of a statement in writing--(i) that is materially false:
 16 (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to
 17 whom the debtor is liable for such money, property, services, or credit reasonably relied;
 18 and (iv) that the debtor caused to be made or published with intent to deceive" to obtain
 19 money, services, or the extension of credit. 11 U.S. C. §523(a)(2)(B).

20 The phrase "statement respecting the debtor's or an insider's financial condition"
 21 is construed narrowly. *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 577-578 (9th Cir.
 22 BAP 2011). In the context of 11 U.S.C §523(a), such statements are limited to "those that
 23 purport to present a picture of the debtor's [or insider's] overall financial health." Such
 24 statements contain information similar to that found in balance sheets or income and loss
 25 statements, although need not be formal financial statements. *Id.* at 578.

26 In the case at hand, the Defendant on various multiple documents fraudulently
 27 omitted the following facts:

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- 1 1. The Defendant fraudulently suppressed and hid material facts when he
2 failed to disclose and misrepresented the amounts he owed for past due
3 federal and states taxes.
- 4 2. The Defendant fraudulently misrepresented his income by consistently
5 stating in writing on loan applications and personal financial statements that
6 it was for amounts which he knew were much higher than his actual income.
7 The fact that he was able to tell the Internal Revenue Service how much his
8 actual income was (Exhibit "54"), on the IRS Installment Agreement and
9 Collection Information document, which the Defendant completed by hand
10 on or about August 8, 2012, indicates that the Defendant was fully aware
11 of how much his actual income was. Moreover, the Defendant admitted he
12 could walk to his accountant's office, which was next to his office, to ask for
13 a profit and loss statement, without incurring a charge, at any time, shows
14 the availability of that information to Defendant. Further, the fact the
15 Defendant demonstrated that he understood the difference between gross
16 receipts and his actual income is significant.
- 17 3. In January of 2014, on the Defendant's last two (2) loans with the Credit
18 Union, the Defendant false claimed that he was still a Farmers Insurance
19 Agent, **AFTER** he was no longer selling Farmers Insurance for the
20 Insurance Companies and had already sold his Farmers Insurance
21 Company Agency to another broker.
- 22 4. On the Defendant's January 2, 2014 loan application, the Defendant falsely
23 checked that he did not know of any reason why there would be an
24 interruption in his income.

25 Clearly, the Credit Union has met all of the elements under 523(a)(2)(A).
26 Specifically, the above items were either outright misrepresentations or fraudulent
27 omissions.

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1 The Defendant knew the falsity and deceptiveness of his conduct. We know this
2 because the Defendant submitted altered/counterfeit documents for his 2004
3 Examination, in an effort to try to make it appear that the Credit Union was previously on
4 notice of facts closer to his actual situation. Specifically the Defendant submitted for his
5 2004 Examination a Personal Financial Statement, dated December 11, 2012 (Exhibit
6 "2"), which had never been given to the Credit Union. It has a notation on it about taxes
7 which by that time would have been past due.

8 The Defendant also produced for his 2004 Examination a separate Personal
9 Financial Statement, dated January 2, 2014 (Exhibit "3"), which he altered by putting
10 additional information on it, disclosing that he knew he owed back taxes. Said additional
11 information about the Defendant's past due taxes was not on the Personal Financial
12 Statement, dated January 2, 2014 (Exhibit "4"), which Defendant actually provided to the
13 Credit Union in January of 2014.

14 Similarly, the Defendant in March of 2012, gave the Credit Union one version of a
15 2011 Tax Return (Exhibit "60") but provided the Credit Union's attorney a different version
16 of the 2011 Tax Return (Exhibit "8") for his 2004 Examination.

17 **Obviously, the Defendant's intentions were to mislead and deceive the Credit**
18 **Union. Otherwise, he would not have been trying to cover his tracks by submitting**
19 **altered and/or fabricated documents at his 2004 Examination.**

20 Not only did the Credit Union justifiably rely upon the information provided by
21 Defendant, as will be discussed below, but the Credit Union also reasonably relied upon
22 said information.

23 The Credit Union asked the Defendant for information as to his outstanding debt
24 in writing. The Defendant misrepresented the information he provided to the Credit Union
25 in writing. The Credit Union also asked for the Defendant's 2011 Tax Return. The Credit
26 Union was given a version of said tax return. There was no way for the Credit Union to
27 know that the version of the 2011 Tax Return provided to it by the Defendant had been
28 altered. Between 2012 and 2014, when the Credit Union was making the loans to the

1 Defendant that are still outstanding, there was no way for the Credit Union to know the
2 Defendant owed past due taxes for 2009 and 2010, upon which he was making
3 payments. Similarly, there was no way for the Credit Union to know that the Defendant's
4 tax debt was increasing as each year passed.

5 The Credit Union also relied upon the Defendant's statement as to his income, in
6 that the Credit Union was given it in writing and was provided tax returns for prior years.
7 An individual's income can increase during a current year and be more than in prior years.
8 Clearly, the Credit Union both justifiably and reasonably relied upon the information
9 provided by the Defendant, with regard to his income.

10 Finally, the Credit Union reasonably relied upon the Defendant's written
11 representation that he was still an agent for the Insurance Companies. The fact was the
12 Credit Union had known the Defendant as an agent for the Insurance Companies. The
13 fact Defendant continued to represent himself to the Credit Union to be an agent for the
14 Insurance Companies, even after he sold his agency, was deceptive.

15 Clearly, the Credit Union has met all of the elements of Section 523(a)(2)(A).

16 If for any reason the Court disagrees with the narrow construction referenced in the
17 *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 577-578 (9th Cir. BAP 2011), then the Credit
18 Union submits it has shown as well, the Credit Union met all the burden to comply with
19 elements of Section 523(a)(2)(B). Specifically, the misrepresentations as to income and
20 taxes were in writing. They were material. They falsely indicated the Defendant's
21 financial condition, upon which the Credit Union reasonably relied upon and for which the
22 Defendant became liable for extensions of money and credit, which the Defendant caused
23 to be made and/or published with the intent to deceive.

24 The bottom line is that had the Defendant not misrepresented his situation with the
25 Internal Revenue Service, which he did in writing, the Credit Union would never have
26 extended to him any loans, until and unless he would have shown the Credit Union that
27 he had taken care of his tax problem.

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1 Similarly, had the Defendant not overstated his income, the Credit Union would not
2 have granted the Defendant any loans.

3 Finally, with regard to the last two (2) loans obtained in January of 2014, after
4 Defendant had sold his business (i.e., his insurance agency) and did not have any
5 realistic prospects of income, the Credit Union would not have granted those loans to the
6 Defendant.

7 IV. CONCLUSION

8 For the reasons stated above, it is submitted that the Judgment entered against
9 the Defendant in the State Court action known as *Farmers Insurance Group Federal*
10 *Credit Union vs. Ruben Alcaraz, etc., et al.*, San Diego County Superior Court Case
11 Number 37-2015-00005875-CU-CL-CTL, should be held to be non-dischargeable in
12 Defendant's bankruptcy.

13 Dated: April 27, 2017

14 /s/ A Lysa Simon
15 A. LYSA SIMON
16 Attorneys for Plaintiff,
17 Farmers Insurance Group Federal
18 Credit Union
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